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BANK & TRUST COMPANY, formerly known as
11 and successor to Borel Private Bank & Trust
Company
12

13 UNITED STATES BANKRUPTCY COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN JOSE DIVISION

16 In re:
17 272 E. Santa Clara Grocery, LLC,
18 Debtor.

CASE NO. 13-53491

CHAPTER 11

**ADDENDUM TO BOSTON PRIVATE
BANK & TRUST COMPANY'S PROOF OF
CLAIM NO. 2-2 AS OF JUNE 27, 2014**

[NO HEARING SET BY THE COURT]

Judge: Hon. Stephen L. Johnson

22
23 Secured Creditor Boston Private Bank & Trust Company ("BPB") hereby submits an
24 addendum to its Proof of Claim [Claim No. 2-2] (the "Addendum") as required by the Court's
25 Order Following Trial on Amended Objection to Claim of Boston Private Bank & Trust
26 Company entered on June 20, 2014 [Dkt. No. 215] to include fees and costs due through June 27,
27 2014. The Addendum is supported by the points and authorities below, the Declaration of
28 Counsel Stephen J. Kottmeier ("Counsel Decl."), the Declaration of David Scheiber ("Scheiber

Decl.”), each filed concurrently herewith, and all other pleadings and documents on file in this case of which this Court may take judicial notice. In support of the Addendum, BPB respectfully represents as follows:

1. Hopkins & Carley, a Law Corporation (“H&C”) has been counsel for secured creditor BPB, formerly known as Borel Private Bank & Trust Company, in matters related to real property located at 272 East Santa Clara Street, San Jose, California 95112 (the “Property”) since approximately October 10, 2010. BPB hereby applies to the Court for allowance of fees and costs for services rendered from October 10, 2010 through June 27, 2014 (the “Engagement Period”). Because the matter is on-going, additional fees and costs thereafter have and will be incurred, but will be addressed in a subsequent filing. BPB reserves all rights to update the Addendum as charges continue to accrue under the subject Promissory Note, Business Loan Agreement, and Deed of Trust (collectively, the “Loan Documents”) until BPB’s secured claim is paid in full and this matter is concluded.

2. Although H&C is not submitting a Fee Application per se, consistent with the Court’s Guidelines for Compensation of Professionals, H&C’s services for this period have been allocated among billing categories to facilitate the Court’s review. However, it is important to note that BPB is seeking reimbursement under its contractual rights and not under the Bankruptcy Code or Bankruptcy Rules governing retention and payment of professionals by the estate or as a Bankruptcy Code created party.

3. BPB seeks recovery of fees for services rendered incurred in the amount of \$391,618.20 and reimbursement of costs incurred in the amount of \$33,263.39 during the Engagement Period. The total of all fees and costs during that period is \$424,881.59. BPB has not previously received any reimbursement for the legal fees and expenses incurred during the Engagement Period.

4. Attached to the Counsel Declaration as Exhibit 1-A is the name of each professional who performed services in connection with this matter during the Engagement Period, his or her hourly rate, and the total number of hours he or she billed during the Engagement Period. (Counsel Decl. ¶ 11). Below is a summary of the professional time for

services rendered during the Engagement Period.

Summary of Professional Time (10/10/2010 to 6/27/2014)¹

Professional	Rate	Hours	Total Fees
Stephen J. Kottmeier	\$ 495.00	2.7	\$ 1,336.50
	\$ 445.50	518.8	\$ 231,125.40
Ross G. Adler	\$ 450.00	6.1	\$ 2,745.00
	\$ 405.00	1.5	\$ 607.50
	\$ 414.00	2.8	\$ 1,159.20
William S. Klein	\$ 450.00	1.4	\$ 630.00
James V. Quillinian	\$ 550.00	0.3	\$ 165.00
Michaeline H. Correa	\$ 315.00	129.9	\$ 40,918.50
Aleksandr Korzh	\$ 243.00	19.7	\$ 4,787.10
	\$ 234.00	21.1	\$ 4,937.40
Jay M. Ross	\$ 405.00	81.4	\$ 32,967.00
	\$ 414.00	24.5	\$ 10,143.00
Brent D. Meyer	\$ 243.00	15.9	\$ 3,863.70
Mariellen S. Facchino	\$ 234.00	76.6	\$ 17,924.40
	\$ 229.50	102.9	\$ 23,615.55
Raphael A. Rodriguez	\$ 81.00	2.3	\$ 186.30
Kyle D. Frankeny	\$ 81.00	7.4	\$ 599.40
Daniel M. Searles	\$ 81.00	1.1	\$ 89.10
Phillip R. Di Tullio	\$ 81.00	59.7	\$ 4,835.70
Samantha N. Downey	\$ 81.00	38.8	\$ 3,142.80
	\$ 85.50	19.1	\$ 1,633.05
Alexander D. Vogt	\$ 85.50	49.2	\$ 4,206.60
TOTAL		1183.2	\$391,618.20

5. Attached to Counsel Declaration as Exhibit 1-B is the complete detailed billing statement for the Engagement Period for each billing category broken into pre-petition and post-petition services performed, the total number of hours devoted by each professional, his or her

1. When H&C was first engaged in this matter, its fees were billed to BPB at its standard rates. Commencing in July 2011, H&C agreed with BPB that due to its expanding relationship with BPB, H&C would bill its fees at a ten percent (10%) discount from its standard rates. Accordingly, H&C's billing rates to BPB for this matter were reduced effective with the services provided in July 2011.

hourly rate, and the total hours he or she billed for the services performed. (Counsel Decl. ¶ 12).

Below is a summary of the billing categories for services rendered during the Engagement Period.

Pre-Petition Fees for Services Rendered (10/10/2010 to 6/27/2013)

Billing Category	Total Hours	Total Fees
1. Analysis and advice regarding loan documents and various enforcement rights and issues	2.10	\$ 1,056.00
2. Preparation of Subordination, Non-Disturbance, and Attornment Agreements with various proposed tenants to protect BPB's rights	10.30	\$ 4,550.40
3. Advice and documentation of an agreement regarding postponement of BPB's foreclosure sale	6.50	\$ 2,863.35
4. Advice and negotiation with Kimomex's counsel and documentation of a loan settlement agreement with Kimomex	9.40	\$ 4,187.70
5. Advice and documentation regarding amendments to the foreclosure postponement agreement	19.00	\$ 8,458.20
6. Assistance to client with demand and other communications with the Debtor or its predecessor or their counsel	9.90	\$ 2,878.20
7. Analysis of environmental issues raised by the Debtor in early 2013	3.10	\$ 1,387.35
8. Research regarding potential issues if bankruptcy were file	2.00	\$ 760.50
9. Preparing and filing of a complaint and motion papers for appointment of receiver	72.30	\$ 23,765.85
SUBTOTAL	134.60	\$ 49,907.55

Post-Petition Fees for Services Rendered (6/27/2013 to 6/27/2014)

Billing Category	Total Hours	Total Fees
1. General tasks related to the Chapter 11 Bankruptcy Case filed by the Debtor	61.90	\$ 24,425.10
2. Performed services related to various bankruptcy motions including seeking a determination that the automatic stay did not apply to rents in this matter	38.90	\$ 16,286.40
3. Opposing the Debtor's inadequate applications to employ counsel resulting the Debtor providing required disclosures	6.00	\$ 2,571.75
4. Opposing the Debtor's initial cash collateral motion (which was denied)	36.90	\$ 13,890.15
5. Moving for relief from the automatic stay based on the unconfirmable plan filed by the Debtor	29.90	\$ 11,483.10
6. Responding to the Debtor's sale motion and dealing with closing of sale	16.10	\$ 6,941.70
7. Opposing Plan filed by the Debtor	77.20	\$ 29,398.05
8. Assisting BPB in its preparation of its Proof of Claim and responding to and litigating the Debtor's objection to BPB's	473.80	\$ 131,324.85

claim, including extensive discovery, trial, and post-trial matters		
9. Investigating the Debtor's members and moving for Rule 2004 examinations for oral testimony and document production and opposing and responding to Debtor's Rule 2004 application for extensive document production	62.40	\$ 24,363.45
10. Preparing for and conducting the initial session of the examination of the Debtor's managing member Andrew Lewis	22.20	\$ 7,682.85
11. Preparation and Prosecution of Creditor's Disclosure Statement and Plan	151.40	\$ 57,291.30
12. Motion to Temporarily Allow Claim	8.90	\$ 3,064.50
13. Preparation of Addendum to Proof of Claim and supporting documents	63	\$12,987.45
SUBTOTAL	1048.6	\$341,710.85

TOTAL FEES	1183.2	\$391,618.20
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6. Attached to Counsel Declaration as Exhibit 1-C is a summary of each expense incurred during the Engagement Period, the provider of the service, and the total expense incurred for each service. (Counsel Decl. ¶ 18). Below is a summary of the expenses incurred during the Engagement Period.

Expenses Incurred (10/10/2010 to 6/27/2014)

Expense Category	Cost
Electronic Legal Research	\$ 12,099.28
Word Processing	\$ 5,182.25
Court Call	\$ 30.00
Mileage	\$ 68.94
Messenger	\$ 410.50
Color copies, Photocopies, & Prints	\$ 7,910.36
Postage & Facsimiles	\$ 338.12
Witness & Mileage Fees	\$ 214.62
Deposition Costs	\$ 5,070.43
Filing Fees	\$ 534.95
Service of Subpoenas	\$ 1,403.94
TOTAL COSTS	\$ 33,263.39

1 7. Pursuant to section 506(b), a creditor is entitled to recovery of fees and costs if:
2 “(1) the claim is an allowed secured claim; (2) the creditor is oversecured; (3) the fees are
3 reasonable; and (4) the fees are provided for under the agreement.” *In re Kamai*, 316 B.R. 544,
4 548 (B.A.P. 9th Cir. 2004) (quoting *In re Salazar*, 82 B.R. 538, 540 (B.A.P. 9th Cir. 1987)). It is
5 undisputed that BPB has a secured claim, that BPB is oversecured, and that fees and costs are
6 provided for in the Loan Documents. (Dkt. No. 215, p. 2, 6, 13). Accordingly, the Court shall
7 allow all fees and costs requested by BPB in the Addendum provided that they are reasonable.
8 *See In re Dalessio*, 74 B.R. 721, 723 (B.A.P. 9th Cir. 1997) (“when fees are provided for in the
9 underlying agreement, and when the creditor is oversecured, allowance of the attorney’s fee is
10 mandatory,” but allowance is limited by the reasonableness requirement in section 506(b)).

11 Under section 506(b), the Court has broad discretion to determine whether fees and costs
12 are reasonable. *See In re Wire Cloth Products, Inc.*, 130 B.R. 798, 814 (Bankr. N.D. Ill. 1991).
13 “The key determinant is whether the creditor incurred expenses and fees that fall within the scope
14 of the fees provision in the agreement, and took the kinds of actions that similarly situated
15 creditors might reasonably conclude should be taken.” *In re Le Marquis Assoc.*, 81 B.R. 576, 578
16 (B.A.P. 9th Cir. 1987). The Court is not required to perform an independent inquiry into each
17 particular matter to determine whether BPB was the prevailing party on that matter. *See In re*
18 *Burnel*, 54 B.R. 462, 465 (Bankr. D. Colo. 1985) (fees are allowed under section 506(b) for
19 unsuccessful motions when an oversecured creditor is protecting its rights in the collateral). Once
20 the Court determines that BPB was reasonable in its actions, then the inquiry is complete and
21 BPB is entitled to recover all fees and costs it incurred protecting its rights in the Property. *See*
22 *Dalessio*, 74 B.R. at 723.

23 In this matter, BPB has taken reasonable actions under the circumstances that any other
24 lender would undertake to protect its interests. As the Court is aware, H&C has assisted BPB
25 continuously for almost four years in protecting its rights in the Property through its various
26 dealings with Kimomex Santa Clara, LLC (the original borrower), the junior lenders, the Debtor,
27 Andrew Lewis (Debtor’s managing member), various proposed tenants, and their respective
28 counsel. The scope of legal services has been broad and has varied depending on the given

1 circumstances. Many of the legal services have been driven directly by the acts and conduct of
2 Andrew Lewis who has dealt with BPB with an unusually high degree of hostility and
3 stubbornness. A comprehensive summary of the reasonable actions taken by BPB in this matter
4 is set forth in the Counsel Declaration filed herewith. (Counsel Decl., ¶¶ 7-10). Given the
5 amount at issue and the complexity of dealing with sophisticated borrowers followed by a
6 contentious junior lien holder, who ultimately caused this bankruptcy filing, the services provided
7 and fees charged are reasonable under the circumstances and should be allowed in full.

8 The Debtor has previously challenged certain post-petition efforts of BPB [Dkt. 88, p.13-
9 14], often with misstatements of the events that actually occurred in this case, and it is uncertain
10 whether the Debtor will continue to make such challenges to the fees requested in the Addendum.
11 To the extent that the Debtor continues to make such challenges, BPB has previously responded
12 to those assertions [Dkt. No. 106, p. 14-16] and for judicial economy hereby incorporates its
13 responses by reference.

14 8. As a procedural matter, it is proper for BPB to seek payment of fees and costs
15 pursuant to section 506(b) via the Addendum to its Proof of Claim and BPB is not required to file
16 an application for compensation under the Bankruptcy Code and Bankruptcy Rules. *See In re*
17 *Atwood*, 292 B.R. 227, 231-32 (B.A.P. 9th Cir. 2003).

18 9. Based upon the forgoing, BPB respectfully requests that the Court allow BPB's
19 fees in the amount of \$391,618.20 and expenses in the amount of \$33,263.39 during the
20 Engagement Period. Should the Debtor raise any objections to the Addendum, BPB respectfully
21 requests that the Court set this matter for hearing so that BPB can adequately respond to those
22 objections.

23 Dated: June 30, 2014

HOPKINS & CARLEY
A Law Corporation

25 By: /s/ Stephen J. Kottmeier
26 Stephen J. Kottmeier
27 Jay M. Ross
28 Attorneys for Secured Creditor
BOSTON PRIVATE BANK & TRUST
COMPANY